PREPARED BY THE COURT:

MARA MODES, *Plaintiff,* v. **MICHAEL FRANCIS, IN HIS CAPACITY AS MAYOR; CATHERINE SCHULTZ, IN HER CAPACITY AS MUNICIPAL CLERK; THE BOROUGH COUNCIL OF THE BOROUGH OF HOPATCONG; COUNCIL MEMBERS RICHARD SCHINDELAR, BRADLEY HOFERCAMP, MARIE GALATE, RICHARD BUNCE, FRANK PADULA AND JOHN YOUNG, AND JOHN RUSCHKE BOROUGH ENGINEER AND PLANNER INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY AS NAMED DEFENDANTS,** *Defendants.*	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: SUSSEX COUNTY** **DOCKET NO: SSX-L-455-18** **Civil Action** **ORDER**

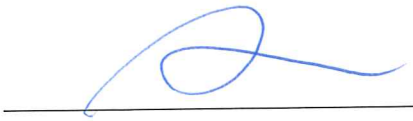
THIS MATTER, having been brought before the Court by way of Motion to Dismiss Plaintiff's Complaint with prejudice, by Schenck, Price, Smith & King, LLP, counsel for Defendants, and opposition having been filed by Plaintiff, pro se, Mara Modes, and upon notice to all parties, and the Court having considered oral argument, the submissions of the parties, and for the reasons set forth in the attached statement of reasons, and for good cause having been shown; therefore,

IT IS, on this 26 day of March 2019;

ORDERED, that Defendants' motion to dismiss Plaintiff's Complaint is **GRANTED**; and it is further

ORDERED, that Defendants' Motion for Sanctions pursuant to R. 1:4-8 is **DENIED**; and it is further

ORDERED, that a copy of this order shall be served upon all parties within seven (7) days of the date of this order.



HON. STUART A. MINKOWITZ, A.J.S.C.

***Opposed**

***Statement of Reasons Attached**

Mara Modes v. Michael Francis, in his Capacity as Mayor, et al.
Docket No. SSX-L-455-18

STATEMENT OF REASONS

Defendants' Motion to Dismiss Plaintiff's Complaint and Motion for Sanctions

Defendants moved to dismiss Plaintiff's Complaint with prejudice, pursuant to R. 4:6-2(e), and for sanctions pursuant to R. 1:4-8. Plaintiff filed a cross-motion for Summary Judgment. Oral argument on the Motion and Order to Show Cause was heard on February 1, 2019.

I. Background

This matter arises out of a Verified Complaint and Order to Show Cause filed on September 25, 2018, by Mara Modes ("Plaintiff"), for alleged violations of the New Jersey State Constitution; Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. ("MLUL"); Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1, et seq. ("LRHL"); Open Public Meetings Act. N.J.S.A. 10:4-6, et seq. ("OPMA"); Open Public Record Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"), and Ethics Violations, N.J.S.A. 52:13D-12, et seq., by Michael Francis in his Capacity as Mayor, Catherine Schults in her Capacity as Municipal Clerk, and the Borough Council of the Borough of Hopatcong. See Compl. Defendants contend they served Plaintiff with a frivolous claims notice in accordance with R. 1:4-8 dated October 29, 2018. Def. Br. at 2; John. E. Ursin Certification (hereinafter "Ursin Cert.") Ex. A.

On November 26, 2018, Plaintiff filed an Amended Complaint, containing only two counts, and adding as Defendants Council Members Richard Schindelar, Bradley Hofercamp, Marie Galate, Richard Bunce, Frank Padula, John Young, Mayor Michael Francis, Municipal Clerk Catherine Schultz, and Mr. John Ruschke Borough Engineer and Planner, individually and in their official capacity. See Am. Compl. Count One alleges violations of Section 28-3B of the Code of

the Borough of Hopatcong. Id. at 4.[1] The Second Count alleges that Mr. Ruschke violated N.J.S.A. 40:9-22.5, et seq. Id. at 5. John Ruschke is the Borough Planner as well as the Municipal Engineer for the Borough and the Land Use Board. Am. Compl. at 2; Defs. Br. at 24. The Amended Complaint did not include the counts from the original Complaint. As a result, the Court issued an Order on November 30, 2018, requiring Plaintiff to "provide a more definite statement." November 30, 2018 Court Order. On December 6, 2018, Plaintiff indicated that the Amended Complaint was intended to incorporate all previous counts of the original Complaint (totaling seven counts). Pl. Correspondence December 6, 2018.

II. Analysis

a. Motion to Dismiss[2]

Rule 4:6-2(e) provides, in relevant part, that a defendant may raise, by motion with accompanying brief, the failure of the plaintiff's pleading to state a claim upon which relief can be granted as a defense to the plaintiff's claim for relief. However, such motions should be granted "in only the rarest of instances." Printing Mart v. Sharp Elect. Corp., 116 N.J. 739, 772 (1989). In approaching a motion to dismiss for failure to state a claim upon which relief can be granted, the Court's inquiry is limited to "examining the legal sufficiency of the facts alleged on the face of the complaint." Id. at 746. The Court is permitted to consider additional documents, aside from the complaint, when those documents form the basis of a plaintiff's claims. Banco Popular N. Am. v.

[1] Defendants note in their Brief in Support of the Motion to Dismiss that Plaintiff has incorrectly identified the section of the Code. Defendants claim that the correct Section of the Code is Section 28-4, not 28-3B.

[2] Plaintiff contends that Defendants' Motion Exhibits B, C, D, F, G, and H are not true and accurate copies because "they are not signed by the Borough Mayor and the Borough Clerk pursuant to N.J.S.A. 40A:60-5(d)," and that Exhibits G and H are missing the last page. . Pl. Opp. at 6-7. N.J.S.A. 40A:60-5(d) requires the mayor to approve an ordinance by signing it, however, it is not clear how this affects the veracity or truthfulness of the Exhibits. Defendants produced these same exhibits again as part their Supplemental Certification with signatures. See John E. Ursin Supplemental Certification (hereinafter "Ursin Supplemental Cert.") Ex. M. Plaintiff does not challenge the accuracy of the exhibits. See Pl. Opp. at 6.

Gandi, 184 N.J. 161, 183 (2005). It is the existence of the fundament of a cause of action in those documents that is pivotal. Id. The Court must search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim . . . ." Id. For purposes of analysis, the plaintiff is entitled to "every reasonable inference of fact . . . [and the examination] should be one that is at once painstaking and undertaken with a generous and hospitable approach." Id.

In reviewing the motion, the Court is not concerned with the "ability of plaintiffs to prove the allegations contained in the complaint." Id. The complaint need only allege sufficient facts as to give rise to a cause of action or *prima facie* case. Dismissal of the plaintiff's complaint is only appropriate after the complaint has been "accorded . . . [a] meticulous and indulgent examination. . . ." Printing Mart, 116 N.J. at 772. Generally, a dismissal for failure to state a claim is without prejudice. Id. at 746; see also Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2009). If dismissal of the plaintiff's complaint is appropriate, the dismissal "should be without prejudice to a plaintiff's filing of an amended complaint." Id. In circumstances where the plaintiff's pleading is inadequate in part, the Court has the discretion to dismiss only certain counts from the complaint. See, e.g., Jenkins vs. Region Nine Housing Corp., 306 N.J. Super. 258 (1997). However, "[i]t has long been established that pleadings reciting mere conclusions without facts and reliance on subsequent discovery do not justify a lawsuit." Glass v. Suburban Restoration Co., Inc., 317 N.J. Super. 574, 582 (App. Div. 1998) (citation omitted). A motion to dismiss "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiffs' claim must be apparent from the complaint itself." Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003) (citation omitted).

i. Count One: New Jersey State Constitution

Count One alleges that "[t]he property in question is in an area designated by the Council of the Borough of Hopatcong ("Borough Council") as an 'area in need of redevelopment' and not in an area of rehabilitation as required by the N.J. State Constitution, and does not meet the requirements for a five (5) year tax abatement and/or tax exemption under: Article VIII Section I paragraph 6 . . . ." Compl. at 3. The Complaint also contends that there was a violation of Article VIII, Section 1(a) in that the nine (9) boat slips at the Property should be taxed as a marina pursuant to Hopatcong Borough Code. Id.[3] Plaintiff also argues that the Property "does not qualify as infill or a multiple dwelling." Pl. Opp. at 12.

Defendants argue that Count One must be dismissed because areas in need of redevelopment qualify under both the Five-Year Exemption and Abatement Law and the LRHL, and that municipalities are permitted to adopt ordinances "setting forth the eligibility of multiple dwellings for exemption or abatements from taxation in areas in need of rehabilitation." Defs. Br. at 6. Defendants argue that research would reveal that rehabilitation and rehabilitation areas are eligible for the abatement. Defs. Br. at 7.

Article VIII, Section I, paragraph 6 of the New Jersey State Constitution states,

> The Legislature may enact general laws under which municipalities may adopt ordinances granting exemptions or abatements from taxation on buildings and structures in areas declared in need of rehabilitation in accordance with statutory criteria, within such municipalities and to the land comprising the premises upon which such buildings or structures are erected and which is necessary for the fair enjoyment thereof. Such exemptions shall be for limited periods of time as specified by law, but not in excess of 5 years.

The Five-Year Exemption and Abatement Law states,

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[3] The Plaintiff incorrectly cites to "Article VIII, para 2." The quoted language is actually from Article VIII, Section 1(a). That section states, "[p]roperty shall be assessed for taxation under general laws and by uniform rules." Article VIII, paragraph 2 does not contain this language.

> The governing body of a municipality may determine to utilize the authority granted under Article VIII, Section I, paragraph 6 of the New Jersey Constitution, and adopt an ordinance setting forth the eligibility or noneligibility of dwellings, multiple dwellings, or commercial and industrial structures, or all of these, for exemptions or abatements, or both, from taxation in areas in need of rehabilitation.

N.J.S.A. 40A:21-4.

The Five-Year Exemption and Abatement Law defines an "area in need of rehabilitation" to be "a portion or all of a municipality which has been determined to be an area in need of rehabilitation or redevelopment pursuant to the 'Local Redevelopment and Housing Law' . . . ." N.J.S.A. 40A:21-3. The LRHL defines both rehabilitation and redevelopment (N.J.S.A. 40A:12-3), and outlines a requirements to deem an area to be in need of rehabilitation (N.J.S.A. 40A:12A-14), as well as a requirements to deem an area to be in need of redevelopment (N.J.S.A. 40A:12A-5).

In order to deem an area to be in need of redevelopment, "the governing body of the municipality shall, by resolution, authorize the planning board to undertake a preliminary investigation to determine whether the proposed area is a redevelopment area according to the criteria set forth in [N.J.SA. 40A:12A-5]." N.J.S.A. 40A:12A-6. Such a determination is made after public notice and a public hearing as provided in subsection (b). Id. After the requirements of N.J.S.A. 40A:12A-6 are met, an area can be determined to be in need of redevelopment if the municipality, by resolution, concludes the area has any of the conditions outlined in N.J.S.A. 40A:12A-5. Redevelopment projects must be done "in accordance with a redevelopment plan adopted by ordinance of the municipal governing body, upon its finding that the specifically delineated project area is located in an area in need of redevelopment or in an area in need of rehabilitation, or in both . . . ."

Here, the Borough Council adopted Resolution #2016-158, and directed the Land Use Board ("the Board") to conduct a preliminary investigation of the Property so that it could determine whether the area is in need of redevelopment. John E. Ursin Certification (hereinafter "Ursin Cert.") Ex. D. On September 6, 2016, the Board held a noticed public hearing and reviewed the investigation/report prepared by Borough Planner, John K. Ruschke. Id. On December 20, 2016, the Planning Board recommended that the Property be designated as an area in need of redevelopment. Id. On February 1, 2017, the Borough Council adopted Resolution #2017-39, and designated the Property as an area in need of redevelopment pursuant to the LRHL, and the Board was directed to develop a redevelopment plan for the Property. Ursin Cert. Ex. B.

The Hopatcong Borough adopted Ordinance #11-2018 on May 2, 2018. Ursin Supplemental Cert. Ex. M. This Ordinance amends the municipal code for the Borough of Hopatcong to include, "[o]nly commercial or industrial property shall be eligible to apply for a tax abatement pursuant to this Article. Multi-family residential structures with three (3) separate dwelling units or more shall also be eligible." Ursin Cert. Ex. C. In addition, applications can only be received and granted with respect to areas that have been designated and remain areas in need of redevelopment. Id.

Even with all factual inferences viewed in favor of the Plaintiff, she is unable to establish a cause of action. Plaintiff's contention that the property does not meet the requirements for a tax abatement under the New Jersey State Constitution because it is not an area declared in need of rehabilitation is statutorily incorrect. As the definitions above demonstrate, both areas in need of redevelopment and rehabilitation qualify. See N.J.S.A. 40A:21-4; see also N.J.S.A. 40A:21-3.

Accordingly, aspects of Count One related to the New Jersey State Constitution are dismissed for failure to state a claim upon which relief can be granted.

Count One further contends that the Property should be taxed as a marina because the application calls for nine boat slips. Compl. at pg. 4. However, it is not disputed that the slips have not yet been taxed, as they have just been completed. Defs. Br. at 7; Ursin Cert. Ex. A. Beyond citing the section of the Borough of Hopatcong Code related to general regulations of marinas and the definition of a marina, Plaintiff makes no correlation to how that affects taxation. Plaintiff also argues that Defendants violated the Borough Code when they failed to obtain permits for a marina.

Plaintiff's claims are premature. Ordinance #15-2018 approved the "tax agreement for the exemption of real estate taxes for the construction of new residential development and payment in lieu of taxes for the Project." Ursin Cert. Ex. D. The Tax Agreement states, "[t]he Entity shall make payments in lieu of taxes ["PILOT"] to the Borough, on a tax phase-in basis, for the improvements completed at the property, beginning January 1st of the Tax Year following substantial completion . . . ." Compl. Ex. F. Defendants stated in their frivolous litigation letter that, "[t]he Tax Assessor captures any improvements in 2018 by including them in her 'book' of assessments transmitted to the County Tax Board on or about January 1st of each year for taxation in the following year." Ursin Cert. Ex. A. If the boat slips were completed in 2018, then they have not yet been taxed.

Accordingly, aspects of Count One related to the taxation of a marina are dismissed, without prejudice, as premature.

b. Count Two: MLUL (Five-Year Exemption and Abatement Regulations)

Count Two alleges that the area must have been designated as an area in need of rehabilitation, and the Property is in an area designated in need of redevelopment, not in an area designated in need of rehabilitation. Compl. at 6. Plaintiff also argues that Greentree's application does not meet the requirements set forth in Ordinance # 11-2018 because the application is for a one or two

family dwelling, not a multiple dwelling. Compl. at pg. 6-7.[4] Plaintiff also argues that townhomes do not meet the definition of "multiple dwelling, the application was untimely, and there are "ineligible improvements" Id.[5]

As discussed above, it is clear that areas in need of rehabilitation and redevelopment both qualify under the Five-Year Exemption and Abatement Law. Accordingly, aspects of Count Two relating to rehabilitation versus redevelopment are dismissed, as Plaintiff fails to state a claim upon which relief can be granted.

Plaintiff's allegations regarding the timeliness of the application and improvements are insufficient. Compl. at 7. Plaintiff has failed establish, prima facie, why the application is untimely or what ineligible improvements have been completed. Accordingly, Count Two is dismissed with regards to allegations of an untimely application and ineligible improvements.

A "dwelling" under the Five-Year Exemption and Abatement Law is defined as "a building or part of a building used, to be used or held for use as a home or residence . . . but shall not mean any building or part of a building, defined as a "multiple dwelling" pursuant to the "Hotel and Multiple Dwelling Law . . . ." N.J.S.A. 40A:21-3(k). This "include[s], as they are separately conveyed to individual owners, individual residences within a cooperative, if purchased separately by the occupants thereof, and individual residences within a horizontal property regime or a

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[4] In Opposition, Plaintiff argues for the first time that the Project does not meet the requirements set forth in N.J.S.A. 40A:21-9. This section deals with applications for tax exemptions for new construction of commercial, industrial, or multiple dwellings. The applicant is required to provide to the municipal governing body in their application different types of information including a general description of the project, a legal description of the real estate, estimates of the costs for completion, and a number of other categories of information. This cause of action was not raised in the Complaint. The Complaint only states that "[t]ownhomes do not qualify as 'multiple dwellings' for 5-year tax abatements and/or exemptions under N.J.S.A. 40A:21-8, in accordance with the provisions of sections 9 through 12 P.L.1991, c. 441 (C. 40A:21-9 through 40A:21-12)." See Compl. at pg. 7. However, there is no mention of the application and how it does not comply with the statute.

[5] Plaintiff argues that the application must be denied because it states an end date of 2019, and the Ordinance requires the project to be completed by 2018. Pl. Opp. at 10. It is not clear how this affects the application and its acceptance. Plaintiff also fails to cite to any documents or case law to support her claim.

condominium . . . ." Id. A "multiple dwelling" is defined as "a building or structure meeting the definition of 'multiple dwelling' set forth in the 'Hotel and Multiple Dwelling Law'. . . ." N.J.S.A. 40A:21-3(o), and it also "means for the purpose of improvement or construction the "general common elements" and "common elements" of a condominium, a cooperative, or a horizontal property regime." Id. The Hotel and Multiple Dwelling Law defines a "multiple dwelling" as "any building or structure of one or more stories and any land appurtenant thereto, and any portion thereof, in which three or more units of dwelling space are occupied, or are intended to be occupied by three or more persons who live independently of each other." N.J.S.A. 55:13A-3(k).[6]

Here, the application seeks to build "New Construction" of a one or two family dwelling. Compl. Ex. E. The application did not state it was for the "[c]onstruction of a multiple dwelling under a tax agreement." Id. Ordinance #11-2018 indicates that the Borough wishes to provide tax incentives for commercial, industrial, and multi-family structures in areas designated in need of redevelopment. Ursin Cert. Ex. C. The amendment states, "[o]nly commercial or industrial property shall be eligible to apply for a tax abatement pursuant to this Article. Multi-family residential structures with three (3) separate dwelling units or more shall also be eligible." Id. The Ordinance also details the application procedure for new construction of commercial, industrial, and multiple dwelling structures. Id. Ordinance #15-2018 indicates that "the Borough Council adopted Ordinance #11-2018 authorizing tax exemptions for the construction of 'multiple dwellings' . . . as authorized under N.J.S.A. 40A:21-8 of the Five-Year Law . . ." Ursin Cert. Ex.

[6] There is also a definition related to ten or more buildings, but does not include [A] building section containing not more than four dwelling units," as long as a number of requirements are met. N.J.S.A. 55:13A-3(k). Condominium associations are required to provide the Bureau of Housing Inspection in the Department of Community Affairs "with any information necessary to justify an exemption for a dwelling unit pursuant to this paragraph." Id.

D. Greentree was granted a tax exemption for the Property on September 5, 2018 when the Borough Council adopted Ordinance #15-2018.

Defendants define "dwelling" as the definition appears in N.J.S.A. 40A:21-3(K). Defs. Br. at 8. However, Defendants later say that Greentree has developed nine multiple dwellings pursuant to the Condominium Act. Defs. Br. at 8.[7] The ordinances appear to indicate the tax incentives were to be reserved for industrial, commercial, multiple-dwelling structures, or multi-family residential structures with three (3) separate dwelling units or more. See Ursin Cert. Exs. C and D. Indeed, Ordinance 15-2018 refers N.J.S.A. 40A:21-8. Ursin Cert. Ex. D. This section is entitled "Tax agreements for construction of commercial, industrial structures or multiple dwellings." It appears that Greentree has satisfied Ordinance 11-2018 because the Property will contain nine (9) single build unit residential structures, and the Ordinance allows for multi-family residential structures of three or more separate dwelling units. In addition, it is undisputed that the Project consists of "nine (9) townhomes . . . situated in two (2), three-story buildings." Defs. Br. Ex. E. This clearly meets the definition of a "multiple dwelling" under N.J.S.A. 55:13A-3(k). As a result, regardless of how the Project is described in the application, it meets the requirements of the Five Year Exemption and Abatement Law.

Accordingly, Count Two is dismissed for failure to state a claim upon which relief may be granted.

[7] Defendants also contend that the Master Deed was filed in compliance with the Condominium Act instead of the Hotel and Multiple Dwelling Law. Defs. Br. at 8. It is not clear why filing under the Condominium Act is controlling. It may be that the property is a condominium, but the classification of the property as a "dwelling" or a "multiple dwelling" does not appear to turn on how the Master Deed was filed, nor is "multiple dwelling" defined in the Condominium Act.

c. Count Three: OPMA[8]

Count Three contends that the public was not provided with a complete packet of documents prior to the September 5, 2018 Council meeting. Compl. at 8. Plaintiff argues that "[t]he Ordinance makes reference to attachments that were not included in the copy distributed to the public," limiting the public's ability to voice its concerns prior to a vote and "curtails the time needed to file in lieu of prerogative writ." Id. Plaintiff also states that the "Mayor and Council receive[d] a 'packet' for the meeting that does not contain the same information given to the public. Id. Lastly, Plaintiff argues the resolution and ordinance distributed to the public were not complete. Id. [9]

The OPMA provides that "no public body shall hold a meeting unless adequate notice thereof has been provided to the public." N.J.S.A. 10:4-9(a). A "public body" includes any board, council, or group of people authorized to "perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person[.]" N.J.S.A. 10:4-8(a). "Meeting" refers to " any gathering…which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body." N.J.S.A. 10:4-8(b). "Public business"

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[8] The Complaint indicates that "[t]he Mayor, [sic] Borough Council did not practice due diligence and should have questioned Mr. Ursin as to why the property qualified, and under the Torts Claims Act are therefore responsible, and caused or will, cause harm to the Plaintiff by abating and exempting taxes in the redevelopment area now and/or in the future increasing the tax burden on the Plaintiff and residents of Hopatcong." Plaintiff does not establish why the Tort Claims Act would be relevant to the cause of action.

[9] Plaintiff argues that Township committees discuss topics that are not publicized, and ordinances are given out shortly before the meeting, so the public has little time to formulate questions. Pl. Opp. at 14-15. Plaintiff also argues that the council informs the public that they do not have answers to questions, requiring the public to make OPRA requests. Pl. Opp. at 15, and that, "[o]ngoing [sic] concerns also include no microphone at the podium and CD quality is poor at best, and there is no possibility of a verbatim transcript of public's questions and/or feedback to among [sic] other things introduced Ordinances [sic]." Id. Plaintiff also asserts that committee meeting dates are not published; that a firing range was constructed without notice to the public, and because the range was already constructed, it did not allow for a prerogative writ filing; and that Ordinances or changes are not posted on the website, but are instead posted at the Municipal Building whose hours of operation are 9:30 to 4:30, making it inaccessible to most of the public. Id. These arguments were raised for the first time in Plaintiff's Opposition, and are not causes of action in her Complaint.

refers to "all matters which relate in any way, directly or indirectly, to the performance of the public body's functions or the conduct of its business." N.J.S.A. 10:4-8(c).

The OPMA defines "adequate notice" as,

> written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) prominently posted in at least one public place reserved for such or similar announcements, (2) mailed, telephoned, telegrammed, or hand delivered to at least two newspapers which newspapers shall be designated by the public body to receive such notices because they have the greatest likelihood of informing the public within the area of jurisdiction of the public body of such meetings, one of which shall be the official newspaper, where any such has been designated by the public body or if the public body has failed to so designate, where any has been designated by the governing body of the political subdivision whose geographic boundaries are coextensive with that of the public body and (3) filed with the clerk of the municipality . . . .
>
> [N.J.S.A. 10:4-8(d).]

The public policy behind OPMA is "the right of [] citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way . . . ." N.J.S.A. 10:4-7. The word "agenda" has been construed by the Appellate Division to have its plain, ordinary meaning, "a list or outline of things to be considered or done." Opderbeck v. Midland Park Bd. of Educ. 442 N.J. Super. 40, 56 (App. Div. 2015) (internal quotation marks omitted). The Court made this decision by citing to the Attorney General's Advisory Opinion No. 19-1976. Id. The Advisory Opinion states, "[t]he question of the scope of an agenda therefore is limited to the notice required to be given for those meetings whose time, date and location are not listed in the annual notice schedule." It also states, "the word agenda refers solely to the list of items to be discussed or acted upon at the meeting."

On January 3, 2018, the Council adopted Resolution #2018-02 at its annual reorganization meeting to establish the 2018 meeting schedule. See Ursin Cert. Ex. F. The resolution explained the location, time, and date for the meetings as well as a full schedule. Id. The resolution indicated that "[f]ormal action may be taken at all meetings," the two newspapers that would be publishing notices, and that all notices would be posted on the bulletin board in the hallway of the Municipal Building. Id. Defendants contend that a copy of the meeting scheduled is also maintained in the Office of the Borough Clerk and posted on the Borough's website. Defs. Br. at 12. A regular meeting was scheduled to take place on both August 1 and September 5, 2018. Ursin Cert. Ex. F.

Ordinance #15-2018 was first introduced at the August 1st meeting. See Ursin Cert. Ex. G. (August 1, 2018 Agenda and Meeting Minutes). The Borough opened the meeting to the public for comments regarding any items listed on the agenda for which no discussion was provided. Id. The minutes demonstrate that Plaintiff participated and asked what the town would be getting out of the abatement, as well as commented on the timing of the abatement, given that the project is already built. Id. Ordinance #15-2018 was introduced and passed first reading by a vote of 5-0, and the agenda and meeting minutes note that the final reading for the Ordinance would take place on September 5, 2018. Id.

Ordinance #15-2018 was listed on the agenda of the September 5, 2018 meeting under a section titled "Introduction of Ordinances." Ursin Cert. Ex. H (September 5, 2018 Agenda and Meeting Minutes). The agenda states, "[b]efore final roll call, Mayor Francis will open the meeting to the public for any questions or comments that they may have regarding Ordinance #15-2018. Id. The minutes indicate that the meeting was opened for public comment concerning items listed in the agenda, and no one participated at this time. Id. A second reading of the Ordinance was done, and a public hearing was held where the public could ask questions or make comments about

Ordinance #15-2018. Id. Plaintiff addressed the New Jersey Constitution and how the area needs to be in need of "rehabilitation," not redevelopment, and Ursin stated the Property was eligible for the abatement. Id. The ordinance passed second reading with an affirmative vote of 5-0. Id. The Council opened the meeting for public comment concerning the good and welfare of the Borough, and no other comments were made about the Property or abatement. Id.

The Ordinance refers to an exhibit that Plaintiff contends was not produced in the copy provided to the public. Ordinance #15-2018 refers to Exhibit A being a Financial Agreement. Ursin Cert. Ex. D. Defendants argue that it was not completed until September 19, 2018. Defs. Br. at 15. Neither Plaintiff nor the public is entitled to draft documents and attachments prior to the Council's consideration, nor is the public entitled to print materials identical to those given to the Mayor and the Council members. Indeed, in Opderbeck, the Appellate Division reversed the trial court's decision that parents were entitled to attachments referenced in the agenda but were not posted on the website or provided to the public. Opderbeck, 442 N.J. Super. at 43. The Court held that "the term agenda, as used in N.J.S.A. 10:4-8(d), does not impose a legal obligation on public bodies to provide copies of any appendices, attachments, reports, or other documents referred to in their agendas." Id. (internal quotation marks omitted).

Here, Plaintiff was not entitled to the draft financial agreement. Plaintiff was provided with a copy of the Ordinance following the first reading. Plaintiff and the public were given multiple opportunities to comment on the proposed ordinance both on August 1st and September 5, 2018. In fact, Plaintiff commented at both meetings about the abatement. There is nothing in OPMA requiring the Borough to provide Plaintiff or the public with a copy of a financial agreement that had not been completed. The Ordinance indicates what the financial agreement would include, and that the Mayor is authorized to execute it with modifications or revisions. Ursin Cert. Ex. D.

Opderbeck also informs public bodies that they do not have to provide the public with attachments in an agenda. In addition the Appellate Division noted an essential distinction between OPRA and OPMA. Opderbeck, 442 N.J. Super. at 57. OPMA is meant to ensure the public has adequate notice of and a right to attend public meetings, whereas OPRA is intended to ensure the public has knowledge about public affairs "and to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Id. (quoting O'Boyle v. Borough of Longport, 218 N.J. 168, 184 (2014). Plaintiff clearly participated during both meetings and notice was provided, satisfying the public policy behind OPMA.

In addition, Plaintiff's statement that the failure to provide the attachment curtailed time needed to file an action in lieu of prerogative writs is not supported either legally or factually in Plaintiff's Complaint. R. 4:69-6(a) indicates that, with certain exceptions, actions in lieu of prerogative writs must be filed no "later than 45 days after the accrual of the right to review, hearing or relief claimed . . . ." Thus, unless an exception applies, "actions taken at a meeting in violation of the [OPMA] are to be challenged within 45 days in a proceeding in lieu of prerogative writs." Mason v. City of Hoboken, 196 N.J. 51, 69 (2008). Plaintiff advances no arguments or facts as to why the timeline should be curtailed or what effect this has on her Complaint. Even with all factual inferences provided to the Plaintiff, she is unable to sustain a claim under OPMA.

Accordingly, Count Three of the Complaint is dismissed.

d. Count Four: OPRA

Count Four contends that the Defendants violated OPRA when they failed to provide attachments referenced in the financial agreement. Plaintiff's September 13, 2018 OPRA request sought "[a]ll paperwork signed, sealed, filled in with dates + attachments, application, and all finalized documents in an 8 ½ X 11 paper format for 468 River Styx Road and finalized ordinance

passed September 5, 2018." Compl. Ex. G. Plaintiff references four different documents in the Complaint: (1) "Exemption Application", referred to as "Exhibit A" in the Tax Agreement; (2) "Ordinance Approving the Tax Agreement", referred to as "Exhibit B" in the Tax Agreement; (3) "Developer's Agreement", referred to as "Exhibit C" in the Tax Agreement; and (4) "Metes and Bounds" referred to as "Schedule 1" in the Tax Agreement. Compl. at 10. Plaintiff argues that none of these documents were attached. Id.

Plaintiff also argues that OPRA was violated because the copy of the tax agreement had two blanks in the preamble (one for identifying the ordinance approving the tax exemption and one for the date the ordinance was adopted). Plaintiff argues her request was not possible to accurately fulfill her request until after the Ordinance was certified. Pl. Opp. at 17. Plaintiff also argues that it is irrelevant whether or not she previously received the documents, and that she should have received notice that the document was not available or for extra time to fulfill the request. Id.

Under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1, "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by [OPRA] as amended and supplemented, shall be construed in favor of the public's right of access[.]" N.J.S.A. 47:1A-1. "The purpose behind the Legislature's enactment of OPRA was 'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581, 588 (2011) (quoting Mason v. City of Hoboken, 196 N.J. 51, 64 (2008)).

OPRA defines a "government record" as:

> [A]ny paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed

> document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

N.J.S.A. 47:1A-1.1.

In other words, in order for a document to qualify as a government record, the requestor must demonstrate, on a threshold basis, that the public employee or entity made, maintained, kept, or received the requested document in the course of his or its official business. If not, the Court will affirm the denial of the request.

N.J.S.A. 47:1A-5(g) states, in pertinent part, "[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof." N.J.S.A. 47:1A-5(g). "[A] custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived." N.J.S.A. 47:1A-5(i).

In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request, unless the requestor has elected not to provide a name, address or telephone number, or other means of contacting the requestor. Id. If the requestor has elected not to provide a name, address, or telephone number, or other means of

contacting the requestor, the custodian shall not be required to respond until the requestor reappears before the custodian seeking a response to the original request. Id.

In a proceeding to challenge the denial of an OPRA request, the requestor may appeal the decision by filing an action with the Superior Court or filing a complaint with the Government Records Council ("GRC"). N.J.S.A. 47:1A-6. The custodian of the records has the burden of proof to show that denial was "authorized by law." Id. A decision of the GRC shall not have value as a precedent for any case initiated in Superior Court pursuant to N.J.S.A. 47:1A-6. N.J.S.A. 47:1A-7. Should the requestor prevail in the Superior Court proceeding they shall be entitled to a reasonable attorney's fee. N.J.S.A. 47:1A-6.

The Appellate Division has held that an individual could not be deemed to have been denied access if the record they requested was already in their possession at the time of the OPRA request. See Bent v. Twp. Of Stafford Police Dep't. Custodian of Records, 381 N.J. Super. 30, 38 (App. Div. 2005); see also Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2008). The Appellate Division also found that requiring a custodian to duplicate a copy of a requested record that was already in the possession of the individual does not advance OPRA's purposes. Bart, 403 N.J. Super. at 618. Here, as Defendants correctly point out, Plaintiff was already in possession of three out of the four documents noted above.

Plaintiff notes in her Complaint that she obtained, by an OPRA request, the Exemption Application. Compl. at pg. 6. Indeed, Exhibit E of Plaintiff's Complaint demonstrates that she was already in possession of the Exemption Application. Plaintiff submitted an OPRA request, dated August 10, 2018, seeking a copy of the application submitted for a tax exemption or abatement for 468 River Styx Road, and Exhibit E contains that very application. Compl. Ex. E. The same is true for Ordinance #15-2018. In an OPRA request, dated September 10, 2018, Plaintiff

requested "[a]ll paperwork approving tax [sic] abatement for 468 River Styx Road." Ursin Cert. Ex. I (OPRA request dated September 10, 2018). Plaintiff attached Ordinance #15-2018 as Exhibit B of her Complaint. In addition, Plaintiff attached a signed copy of this ordinance as part of Exhibit G. As a result, it is clear that Plaintiff was already in possession of Ordinance #15-2018.

In addition, Plaintiff was already in possession of the Developer's Agreement. On August 23, 2018, Plaintiff submitted an OPRA request for the "[d]evelopers [sic] Agreement for 468 River Styx Road." Ursin Cert. Ex. J (OPRA request dated August 23, 2018). A section entitled, "Agency Use Only" indicates that Plaintiff had paid for the document.

Lastly, as to the Metes and Bounds request, the Borough argues that "[it] was not in possession of a document entitled "Metes and Bounds," referred to as Schedule 1 of the Tax Agreement." Defs. Br. at 20.[10]

Under OPRA, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request . . . ." N.J.S.A. 47:1A-5. N.J.S.A. 47:1A-5(g) states, in pertinent part, "[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof." N.J.S.A. 47:1A-5(g). If the custodian does not "respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request . . . ." N.J.S.A. 47:1A-5. There is no denial of access if a request seeks documents that do not exist or are not in the possession of the custodian. Bent, 381 N.J. Super. at 38. Plaintiff has yet to produce any evidence

[10] During oral argument on February 1, 2019, Defendants noted that they are now in possession of the Metes and Bounds. However, Defendants noted they were provided this document a significant amount of time after Plaintiff had made an OPRA request for the document.

as to why she believes the Borough was in possession of the document at the time of her OPRA request.

Plaintiff argues there were blanks indicating which Ordinance approved the Application and what date the Ordinance was adopted on. Compl. at. 10. It is not clear how two blanks in a document violate OPRA. The Borough was required to produce the responsive document as it existed, and the Borough did so. In addition, the fact that Plaintiff did not receive the exhibits contained in the Tax Agreement as part of her OPRA request for the agreement, is moot because she had received the exhibits separately and through other OPRA requests.

Accordingly, Count Four of Plaintiff's Complaint is dismissed.

e. Count Five: Ethics Violations

Count Five argues that ethics violations were committed by the Council under N.J.S.A. 52:13D-12 et seq, the New Jersey State Conflicts Law, because Richard Hoer, a resident of Hopatcong and an officer of Greentree, owns property in the area designated in need of redevelopment, is related to the Land Use Board secretary, is a former member of the Land Use Board and the Borough Council, and worked with and established relationships with John Ruschke and other committee members and town officials. Compl. at 11; Pl. Opp. at 18. Plaintiff also argues that there are ethics violations in the "Borough Council's refusal to designate and tax boat slips associated with development [sic] as a "marina" in violation Borough [sic] Ordinance." Compl. at 11.

The New Jersey State Conflicts Law does not apply here. N.J.S.A. 52:13D-13(a) defines a "State agency" as:

> [A]ny of the principal departments in the Executive Branch of the State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department, the Legislature of the State and any office, board,

> bureau or commission within or created by the Legislative Branch, and, to the extent consistent with law, any interstate agency to which New Jersey is a party and any independent State authority, commission, instrumentality or agency.

Counties or municipalities are not agencies or instrumentalities of the State. N.J.S.A. 52:13D-13(a). A "State officer or employee" is defined as "any person, other than a special State officer or employee (1) holding an office or employment in a State agency, excluding an interstate agency, other than a member of the Legislature or (2) appointed as a New Jersey member to an interstate agency." N.J.S.A. 52:13D-13(b). Here, none of the named Defendants qualify as a "State agency" or as a "State officer or employee." All Defendants relate to the municipality of Hopatcong.

The Local Government Ethics Law ("LGEL") governs ethics complaints against municipal officers. N.J.S.A. 40A:9-22.1 et seq. Plaintiff did not make a claim under the LGEL Notwithstanding, for the purposes of this Motion, the Court will analyze the Plaintiff's arguments as though she had.

N.J.S.A. 40A:9-22.5(d) provides that:

> No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment;

N.J.S.A. 40A:9-22.4 states, " [t]he Local Finance Board in the Division of Local Government Services in the Department of Community Affairs shall have jurisdiction to govern and guide the conduct of local government officers or employees regarding violations of the provisions of this act" unless the county or municipality has created ethics board in accordance with the act. The Local Finance Board has the power "to initiate, receive, hear and review complaints and hold hearings with regard to possible violations of this act," "to render advisory opinions," and "to enforce the provisions of this act and to impose penalties for the violation thereof as are authorized

by this act." N.J.S.A. 40A:9-22.7. Accordingly, because the statute requires an ethics complaint to be heard by the Local Finance Board, this Court lacks jurisdiction to hear Count Five.

Lastly, Plaintiff states that there are "ethics violations by the Borough Councils [sic] failure to designate and tax boat slips associated with development [sic] as a 'marina' in violation of Borough Ordinance." Compl. at 11. Plaintiff fails to connect this allegation to any statute, case law, or facts to support the claim. Moreover, these allegations were never raised in the Complaint and are insufficient to withstand the instant Motion.[11]

Accordingly, Count Five of Plaintiff's Complaint is dismissed.

f. Count Six: Code of the Borough of Hopatcong

Plaintiff argues that the Borough Council violated Chapter 28, Article I, Section 28-4 of the Code of the Borough of Hopatcong when it appointed Mr. Ruschke as Borough Planner and Municipal and Land Use Board Engineer. Am. Compl. at 4. Plaintiff also alleges Mr. Ruschke violated the same section when he accepted all of the positions, and argues that N.J.A.C. 13:40-3.1(a) and N.J.S.A. 40.9-22.5[12] provides authority for why Mr. Ruschke could not hold all three positions. Id.; Pl. Opp. at 20. Plaintiff also contends that Mr. Ruschke should be immediately removed from employment with the Borough.

Section 28-4, entitled "Organization of Municipal Land Use Board; offices; expenses," states:

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[11] The Court also notes that Plaintiff's arguments concerning Mr. Hoer's involvement in the construction of a firing range are unsupported, and were never raised in the Complaint. Pl. Opp. at 19. Plaintiff's contentions regarding the altering of ordinances, parking lots being negotiated, and incomplete applications are not supported by any facts, and were raised for the first time in her Opposition papers. Id. Plaintiff also states that Greentree is developing in an "environmentally sensitive area and within a riparian zone," but Plaintiff fails to demonstrate that the zone is actually environmentally sensitive or what effect this has on her conflict of interest arguments. Pl. Opp. at 19. Lastly, Plaintiff asserts that the Land Use Board is required to have an environmental commission member pursuant to N.J.S.A. 40:55D-23. Pl. Opp. at 19. While N.J.S.A. 40:55D-23 mentions environmental commission members in regards to the classes of membership on a planning board, Plaintiff never raised this issue in her Complaint.

[12] It is unclear which statute Plaintiff is referring to, as this is not a proper citation.

> The Municipal Land Use Board shall elect a Chairman and Vice Chairman from the members of Class IV, and select a Secretary who may or may not be a member of the Municipal Land Use Board or a municipal employee, and create and fill such other offices as established by ordinance. An alternate member shall not serve as Chairman or Vice Chairman of the Municipal Land Use Board. The Board shall have legal counsel pursuant to contract at a fixed rate of compensation, who shall be an attorney at law of the State of New Jersey, other than the Municipal Attorney, and who shall be qualified to serve the Municipal Land Use Board. **The Board may also appoint a licensed professional engineer in the State of New Jersey, who does not [sic] be the Borough Engineer.** [13] The Board may also appoint or engage a licensed professional planner in the State of New Jersey. The Board may also employ, contract for and fix the compensation of other staff and services as it may deem necessary, not exceeding, exclusive of gifts or grants, the amount appropriated by the governing body for its use. The governing body shall make provision in its budget and appropriate funds for the expenses of the Municipal Land Use Board.
>
> [Emphasis added].

"The role of the Court in statutory interpretation 'is to determine and effectuate the Legislature's intent.'" Marino v. Marino, 200 N.J. 315, 329 (2009) (citing Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009)). The court must first look to the plain language of the statute to determine whether the Legislature's intent can be derived from the words it has chosen. Id. (citing Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 264 (2008)). "[I]f the plain language of the statute is not clear or if it is susceptible to more than one possible meaning or interpretation, courts may look to extrinsic secondary sources to serve as their guide." Id. (citation omitted). "Although statutory interpretation may require the deletion of words where necessary to effectuate

[13] Defendants, in their brief, added to this sentence the word "need." Defs. Br. at 23. Plaintiff argues that Defendants have violated Borough Code Section 1.13 because they have misrepresented Borough Code Section 28-4 by inserting the word "need." Pl. Opp. at 7. Plaintiff requests that the Court impose sanctions against Defendant under Section 1.13, referring to "Altering or tampering with Code; penalties for violation." Id. at 8. This section states, "[i]t shall be unlawful for anyone to improperly change or amend, by additions or deletions, any part or portion of the Code or to alter or tamper with such Code in any manner whatsoever which will cause the law of the Borough of Hopatcong to be misrepresented thereby." It is clear that there is an omission in Section 28-4. Defendants added the word in brackets, indicating that it was an addition made to the quote. Thus, there was no attempt to alter the Code, only an argument on its interpretation.

the legislative intention, an inference of surplusage in a legislative enactment should be not readily entertained." Fairken Assocs. v. Hutchin, 223 N.J. Super. 274, 277-78 (Super. Ct. 1987) (internal citations omitted). The Appellate Division also notes that "legislative language must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless." In re Sussex Cty. Mun. Utils. Auth. 198 N.J. Super. 214, 217 (App. Div. 1985) (internal quotation marks and citation omitted). Language that is deemed inadvertent or surplusage can be disregarded if it is "inconsistent with the intent of a statute otherwise revealed." Mahwah Realty Assocs., Inc. v. Twp. of Mahwah, 430 N.J. Super. 247, 257 n. 7 (App. Div. 2013).

N.J.S.A. 40:55D-24 governs the organization of Municipal Planning Boards, and it states,

> [t]he planning board shall elect a chairman and vice chairman from the members of Class IV, select a secretary who may or may not be a member or alternate member of the planning board or a municipal employee, and create and fill such other offices as established by ordinance. An alternate member shall not serve as chairman or vice chairman of the planning board. It may employ, or contract for, and fix the compensation of legal counsel, other than the municipal attorney, and experts, and other staff and services as it may deem necessary, not exceeding, exclusive of gifts or grants, the amount appropriated by the governing body for its use. The governing body shall make provision in its budget and appropriate funds for the expenses of the planning board.

Here, Section 28-4 or the Borough Code clearly has an omission. The sentence at issue states, "[t]he Board may also appoint a licensed professional engineer in the State of New Jersey, who does not [sic] be the Borough Engineer." The plain language of the code leads to only one possible meaning, that the sentence should state, "[t]he Board may also appoint a licensed professional engineer in the State of New Jersey, who does not [need to] be the Borough Engineer." The reason the Court comes to this conclusion, is that Section 28-4 of the Borough Code added language related to engineers, but the remainder of the section has very similar language to that in N.J.S.A. 40:55D-24. "Neither the limiting language as to attorneys nor the silence as to experts grants the

council any power to actively or passively interfere with the board's selection of professionals." Planning Bd. of Leonia v. Borough Council of Leonia, 222 N.J. Super. 207, 212 (Law Div. 1987) (citing N.J.S.A. 40:55D-20). In addition, "[t]he lack of statutory constraints within N.J.S.A. 40:55D-24 on expert appointments must be construed as a delegation of unbridled discretionary power to the board." Id.

A reading of the Borough Code and N.J.S.A. 40:55D-24 reveals that planning boards are given wide discretion to appoint experts. Section 28-4 gives the Board wide discretion to hire "other staff and services as it may deem necessary," with the only limitation being that the hiring cannot exceed the amount of money appropriated by the governing body. It appears that the Board is to be given discretion in hiring with minimal limitations, thus leading to the conclusion that the Board's engineer can be the Borough Engineer, but does not have to be.

Plaintiff is also incorrect in her assertion that Mr. Ruschke is prohibited from holding all of his current positions. The board of adjustment and planning board are allowed to contract experts or other staff for services under N.J.S.A. 40:55D-71 and 40:55D-24. Plaintiff argues that "[a]s V.P. of Hatch Mott MacDonald, and/or V.P. of Mott MacDonald Engineer [sic] is getting paid to fill three positions, to do the work, check his own work and plan work to profit his company." In addition, N.J.A.C. 13:40-3.1 refers only to the licensure requirements for a "professional engineer" and a "land surveyor." Neither the regulation nor the statute prohibit Mr. Ruschke from holding all three positions. As a result, Count Six of the Complaint is dismissed for failure to state a claim upon which relief can be granted.

g. Count Seven: N.J.S.A. 40:9-2.5 et seq., Local Government Ethics Law

Count Seven also alleges conflicts-of-interest in violation of N.J.S.A. 40:9-.25. Plaintiff argues that Mr. Ruschke has a conflict of interest because he is the Municipal and Land Use Board

Engineer, and was being paid to assess the Property and determine if it was in an area in need of redevelopment. Am. Compl. at 5. Plaintiff contends there is a conflict because his firm was involved in the assessment of the Borough of which Mr. Ruschke was employed. Id.

In addition, Plaintiff contends Mr. Ruschke also has a conflict of interest as it relates to Mr. Hoer because Mr. Ruschke's report directly impacted Greentree, Mr. Hoer's business, Am. Compl. at 5, and the study was done shortly after Mr. Hoer resigned from the Borough Council. Id. As noted above in the discussion for Count Five, N.J.S.A. 40A:9-22.5(d) provides the standard for local government officials and employees. In addition, the Supreme Court laid out four scenarios in Wyzykowski that require disqualification:

> (1) "Direct pecuniary interests," when an official votes on a matter benefitting the official's own property or affording a direct financial gain; (2) "Indirect pecuniary interests," when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member; (3) "Direct personal interest," when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman's mother being in the nursing home subject to the zoning issue; and (4) "Indirect Personal Interest," when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.

Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993).

Assuming all factual inferences in favor of the Plaintiff, the Court will assume that Mr. Ruschke did in fact work for the Borough as its Engineer during the period that Mr. Hoer was on the Council. Even if that fact is true, it is not clear why this presents a conflict-of-interest. Mr. Ruschke merely performed the study and provided the study to the Land Use Board. None of the four categories from Wyzykowski apply here. Mr. Ruschke does not receive any direct financial gain based on the results of the study; there are no apparent close ties between Mr. Ruschke and Mr. Hoer; the two individuals are not blood relatives; and there is no indication from the Complaint

or facts that Mr. Ruschke's judgment was affected. Accordingly, Plaintiff's allegations fail to demonstrate a conflict of interest.

In addition, for the first time in her Opposition papers, Plaintiff argues that N.J.A.C. 13:40-3.1(a)(4) has been violated. However, the citation to this regulation appears to be incorrect. Pl. Opp. at 19. Plaintiff is probably referring to N.J.A.C. 13:40-3.5(4), which involves prohibited acts of "professional engineers" and "land surveyors." Notwithstanding, Plaintiff has failed to demonstrate how Mr. Ruschke has violated (ii) or (iii) of N.J.A.C. 13:40-3.5(4). Plaintiff's Complaint and opposition papers fail to set forth any facts as to Mr. Ruschke's participation in deliberations of the Borough related to his services, or how Mr. Ruschke accepted compensation from more than one interested party to create a conflict.

Accordingly, Count Seven of the Complaint is dismissed.

h. Summary Judgment

Plaintiff moves for cross-summary judgment on all counts. Under Rule 4:46-2(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to a judgment or order as a matter of law." As the Brill Court explained, the "essence" of the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Brill v. The Guardian Life Insurance Co., 142 N.J. 520 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). Moreover, "on a motion for summary judgment the court must grant all the favorable inferences to the non-movant." Brill, 142 N.J. at 536. "The slightest doubt as to an issue of material fact must be reserved for the

factfinder, and precludes a grant of judgment as a matter of law." Akhtar v. JDN Properties at Florham Park, L.L.C., 439 N.J. Super. 391, 399 (App. Div. 2015) (citation omitted).

Although non-movants obtain the benefit of all favorable inferences, bare conclusions without factual support in affidavits or the mere suggestion of some metaphysical doubt as to the material facts will not overcome motions for summary judgment. R. 4:46-5; see also Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999) (requiring submission of factual support in affidavits to oppose summary judgment motion); Heljon Management Corp. v. Di Leo, 55 N.J. Super. 306, 312 (App. Div. 1959) ("It is not sufficient for the party opposing the motion merely to deny the fact in issue where means are at hand to make possible an affirmative demonstration as to the existence or non-existence of the fact."); Fargas v. Gorham, 276 N.J. Super. 135 (Law Div. 1994) (self-serving assertions alone will not create a question of material fact sufficient to defeat summary judgment motion). A non-moving party "cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill, 142 N.J. at 529. Therefore, if the opposing party only points to "disputed issues of fact that are 'of an insubstantial nature' the proper disposition is summary judgment." Id.

Rule 4:46-2 describes the requirements of a motion for summary judgment and any opposition thereto. Under Paragraph (a) of the Rule, a moving party must include a statement setting forth the undisputed material facts with precise citation to the record. R. 4:46-2 (a). Paragraph (b) then requires a party opposing a motion for summary judgment to file a responding statement admitting or denying each fact, with precise citation to the record. R. 4:46-2 (b). "Subject to R. 4:46-5 (a), all material facts which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically denied [.]" Id.

Plaintiff has failed to include a statement setting forth the undisputed material facts with precise citations to the record, as is required under R. 4:46-2(a). Plaintiff has also failed to demonstrate which facts supporting the claims are undisputed. Indeed, Plaintiff did not formerly file a cross-motion for summary judgment, she merely noted in her Opposition that summary judgment should be entered. As a result, to the extent that Plaintiff's Opposition moves for summary judgment, the motion is denied.

i. Sanctions for Frivolous Litigation Pursuant to R. 1:4-8

Rule 1:4-8 addresses frivolous litigation. Rule 1:4-8(d) authorizes a sanction against an attorney or pro se party for violating Rule 1:4-8(a), which requires an attorney to certify, based on "knowledge, information, and belief" after reasonable inquiry, that, among other things, "the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." R. 1:4-8(a)(2); Toll Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61, 68-69 (2007) (stating Rule 1:4-8 outlines the motion procedure for a party seeking attorney's fees directly incurred from the suit); see also N.J.S.A. 2A:15-59.1(a)[14] (authorizing sanctions for the prevailing party when the underlying litigation is deemed frivolous). This Rule requires the movant to describe the specific conduct alleged to have violated the Rule, and include a certification that the

[14] N.J.S.A. 2A:15-59.1 provides that a prevailing party in a civil action may be awarded reasonable costs and attorney fees if the court finds that the complaint or defense of the nonprevailing party was frivolous. For a filing to be considered frivolous under the statute, a judge must find that:

> (1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
>
> (2) The nonprevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.
>
> [N.J.S.A. 2A:15-59.1(b).]

movant served written notice and demand upon the attorney or pro se party who signed or filed the challenged pleading. R. 1:4-8(b)(1).[15] The notice and demand must include a demand that the pleading be withdrawn, and notice that an application for sanctions shall be made within twenty-eight days of service. Id. This is known as the "safe harbor" provision. Toll Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61, 69 (2007). Rule 1:4-8(b)(2) further requires a motion for sanctions to be made within 20 days of entry of final judgment and permits the court to award the prevailing party reasonable attorney's fees incurred in presenting or opposing the motion.

The court must strictly interpret the statute and the rule against the applicant seeking an award of fees. LoBiondo v. Schwartz, 199 N.J. 62, 99 (2009); DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 226 (App. Div. 2000) (citation omitted). This strict interpretation is grounded in "the principle that citizens should have ready access to . . . the judiciary." Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div.) (citation omitted), certif. denied, 162 N.J. 196 (1999). "The statute should not be allowed to be a counterbalance to the general rule that each litigant bears his or her own litigation costs, even when there is litigation of 'marginal merit.'" Id. (quoting Venner v. Allstate, 306 N.J. Super. 106, 113 (App. Div. 1997)). The court should award sanctions in only exceptional cases. See Iannone v. Mchale, 245 N.J. Super. 17, 28 (App. Div. 1990). An award of

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[15] More specifically, Rule 1:4-8(b)(1) ("Motions for Sanctions") provides:

> An application for sanctions under this rule shall be by motion made separately from other applications and shall describe the specific conduct alleged to have violated this rule. No such motion shall be filed unless it includes a certification that the applicant served written notice and demand pursuant to R. 1:5-2 to the attorney or pro se party who signed or filed the paper objected to. The certification shall have annexed a copy of that notice and demand, which shall (i) state that the paper is believed to violate the provisions of this rule, (ii) set forth the basis for that belief with specificity, (iii) include a demand that the paper be withdrawn, and (iv) give notice, except as otherwise provided herein, that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdrawn within 28 days of service of the written demand.
>
> [R. 1:4-8(b)(1).]

attorney fees, costs, and sanctions "is not warranted where the plaintiff had a reasonable, good faith belief in the merits of the action." Wyche v. Unsatisfied Claim & Judgment Fund of N.J., 383 N.J. Super. 554, 561 (App. Div. 2006). This test is one of objective reasonableness. Id. "When the petitioner's conduct bespeaks an honest attempt to press a perceived, though ill-founded and perhaps misguided, claim, he or she should not be found to have acted in bad faith." Belfer, 322 N.J. Super. at 144-45. The party seeking sanctions bears the burden to prove bad faith. Ferolito, 408 N.J. Super. at 408.

New Jersey Courts have held that "an assertion is deemed frivolous when 'no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable.'" First Atlantic Federal Credit Union v. Perez, 391 N.J. Super. 419, 432 (App. Div. 2007) (internal citations omitted). The term frivolous should be strictly construed to avoid limiting access to the courts. Id. Attorney's fees will not be awarded "where a party has a reasonable and good faith belief in the merit of the cause." Id. (internal citations omitted).

An award under Rule 1:4-8 is limited to an amount "sufficient to deter repetition of such conduct," and may consist of an order to pay a penalty into court or an order directing payment of the moving party's attorney's fees, or both. R. 1:4-8(d). The Court is required to describe the conduct determined to be a violation of the rule, and to explain the basis for the sanction imposed. Id. Accordingly, an award of attorney's fees as a sanction under the Rule requires findings of fact and conclusions of law as to each element of the award. Alpert, Goldberg v. Quinn, 410 N.J. Super. 510, 547 (App. Div. 2009), certif. den. 203 N.J. 93 (2010).

Notably, with regard to pro se parties, the comment to Rule 1:4-8 provides that:

> **pro se parties are regarded as lawyers for purposes of this Rule.** See Venner v. Allstate, 306 N.J. Super. 106, 112 (App. Div. 1997); Trocki Plastic Surg. v. Bartkowski, 344 N.J. Super. 399, 404-405

(App. Div. 2001), certif. den. 171 N.J. 338 (2002); Triffin v. ADP, Inc., 394 N.J. Super. 237, 250 n.3 (App. Div. 2007).

[Pressler & Verniero, cmt. 1 on R. 1:4-8(f) (emphasis added).]

The decision to award attorney's fees pursuant to Rule 1:4-8 is within the trial judge's sound discretion. McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (App. Div. 2011) (citing DeBrango v. Summit Bancorp., 328 N.J. Super. 219, 229 (App. Div. 2000)).

At the outset, the Court notes that Counts Six and Seven were not included in the notice and demand, as they had been filed after the notice and demand was sent. Thus, these two counts will not be considered in the sanctions analysis. The Court would also like to address Plaintiff's contention that the notice and demand letter is inadequate. Pl. Opp. at 3.

Plaintiff, for the first time, notes a number of alleged issues with the notice and demand letter. See Pl. Opp. at 3-6. Plaintiff believes there are errors that "call into question the validity of this document." Pl. Opp. at 3. Plaintiff notes that the Docket Number states "SSX-L-445-18" instead of the correct Docket Number. Id. The Court notes the actual Docket Number is SSX-L-455-18, and only one digit is incorrect. Plaintiff notes the letter indicates it is written in accordance with R. 1:4-8(b)(3) referring to law firms. Pl. Opp. at 4. Plaintiff believes the notice and demand was sent for political reasons and amounts to harassment. Pl. Opp. at 4-6.[16] Plaintiff raises issues in regards to her candidacy for Borough Council, and the Defendants' use of the letter as well as misconstruing her Complaint in order to gain a political advantage. Id.[17]

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[16] Plaintiff did not raise this argument in her Complaint or in the Amended Complaint. As Defendants correctly note, most court filings are a matter of public record when they are filed. R. 1:38-1 states, "[c]ourt records and administrative records as defined by R. 1:38-2 and R. 1:38-4 respectively and within the custody and control of the judiciary are open for public inspection and copying except as otherwise provided." It is irrelevant that Plaintiff did not take action to publicize the fact that she had filed a Complaint.

[17] Plaintiff's contentions about the politicizing of her Complaint are unsupported, and it is unclear how these issues relate to the notice and demand letter. The minutes from the October 17, 2018 Meeting indicate that "Mr. Ursin informed the Governing Body that a lawsuit was filed against the Borough challenging the 5 year tax abatement granted to Greentree. He stated that the suit is meritless and that he will file to have it dismissed early on." Ursin

Here, Defendants did send Plaintiff the proper notice and demand on October 29, 2018. See Ursin Cert. Ex. A. Defendants correctly note that the letter specifically describes the reasons why each count in Complaint is frivolous. Ursin Cert. Ex. A. In addition, Defendants also note that the letter was revised on October 31, 2018 to correct an error. Defs. Reply at 5. The revision indicated that the Defendants' demand Plaintiff dismiss her complaint as to "all Defendants." Ursin Supplemental Cert. Ex. K. Minor mistakes in the letter such as one incorrect digit in the docket number are do not make the notice and demand letter improper. Plaintiff never responded to that notice, in fact, she filed an Amended Complaint to add more defendants and two additional counts.

Defendants simply state that "the Plaintiff cannot legitimately maintain the instant action under any set of facts or cognizable legal theory. As such, the Complaint must have been presented for an improper purpose, or in order to harass and/or to cause needless increase in the cost of litigation." Defs. Br. at 26. This statement is conclusory, and does not support the claim that it was filed for an improper purpose.

Defendants will not be awarded fees in this case. While Plaintiff's counts have been dismissed, it does not appear that Plaintiff filed this Complaint in order to harass the Defendants. Plaintiff raised a genuine issue with regards to statutory interpretation in Count Three that the Court was required to substantially analyze, and she did "ha[ve] a reasonable, good faith belief in the merits of the action." Wyche v. Unsatisfied Claim & Judgment Fund of N.J., 383 N.J. Super. 554, 561 (App. Div. 2006). Accordingly, Defendants' are not entitled to fees.

III. Conclusion

Accordingly, Defendants' motion to dismiss Plaintiff's Complaint is **granted**. Defendants' motion for sanctions is **denied**. A conforming Order accompanies this Statement of Reasons.

Supplemental Cert. Ex. L. It does not appear that Plaintiff's name was mentioned or that a candidate had filed the lawsuit. Even if that was the case, it is not clear how this effects Plaintiff's lawsuit or the notice and demand letter.